Victory Markets, Inc. d/b/a Great American *and* United Brotherhood of Carpenters and Joiners of America, Local Union 258, AFL–CIO

Concord Asset Management *and* United Brotherhood of Carpenters and Joiners of America, Local Union 258, AFL–CIO. Cases 3–CA–17591, 3–CA–17593, and 3–CA–17592

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 2, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Victory Markets, Inc. d/b/a Great American (Respondent Victory) filed cross-exceptions and a brief in support of them and in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and, solely for the reasons set forth below, has decided to affirm the judge's rulings, findings, and conclusions as modified herein. Revised Orders and notices are substituted for those recommended by the judge.[1]

1. Overview

Respondent Victory operates the Cooperstown and Oneonta, New York grocery stores involved in this case. The Oneonta store is in the Southside Mall, which is managed by Respondent Concord Asset Management (Respondent Concord). In late December 1992,[2] nonemployee union representatives engaged in area standards/customer boycott handbilling at both stores, to protest alleged nonunion and substandard wages paid by contractors on work being performed to remodel the Cooperstown store.

The complaint alleges that the Respondents violated Section 8(a)(1) of the Act by discriminatorily prohibiting the union representatives from "picketing"[3] in the parking lots in front of both stores, by demanding that they leave the premises, and by causing the police to threaten them with arrest.

2. Protected activity

Respondent Victory contends that the handbilling was not protected by the Act because "any number of statements in the handbills . . . were false and defamatory."

a. *Facts*

One of the handbills stated in pertinent part (emphases in original):

PLEASE *DON'T* SHOP AT GREAT AMERICAN/VICTORY MARKETS

WHAT WOULD YOU DO IF SOMEONE TOOK YOUR JOB BY WORKING FOR LESS MONEY [& INADEQUATE HEALTH COVERAGE] OR [OR ILLEGALLY WORKING "OFF THE BOOKS"??][4]

GREAT AMERICAN/VICTORY MARKETS IS HURTING AREA CONTRACTORS; AREA WORKERS; OTHER AREA BUSINESSES AND OUR AREA ECONOMY BY THE FOLLOWING;

BY *not* BIDDING THEIR CONSTRUCTION WORK AT THE FAIR *area prevailing* WAGE RATE.

BY HIRING OUT OF AREA OR OUT OF STATE CONTRACTORS WHO IMPORT THEIR EMPLOYEES.

BY HIRING CONTRACTORS WHO PAY POOR SUBSTANDARD WAGES, UNDERMINING FAIR AREA CONTRACTORS AND WORKERS.

BY USING CONTRACTORS WHO CAN PAY AS LOW AS MINIMUM WAGE ($4.25 PER HOUR).

The other handbill stated in pertinent part (emphasis in original):

TO THE CUSTOMERS OF GREAT AMERICAN/VICTORY MARKETS

PLEASE DO NOT PATRONIZE GREAT AMERICAN/VICTORY MARKETS

. . . .

JIM SMITH CONSTRUCTION CO. OF LONG ISLAND, "GENERAL CONTRACTOR" FOR GREAT AMERICAN/VICTORY MARKETS, SUBCONTRACTED WORK AT THEIR COOPERSTOWN LOCATION TO UNFAIR NONUNION CONTRACTORS, HY-TIME CONST. CO. OF LONG ISLAND & FRED WEST CO., WHO IMPORT THEIR WORKERS AND PAY VERY SUB-STANDARD WAGES & FRINGE BENEFITS.

. . . .

[1] We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] All dates are 1992 unless otherwise stated.

[3] The reference to "picketing" in the complaint, rather than to handbilling, appears to be an inadvertent error. There is no picketing involved in this case.

[4] There are two substantially identical versions of this handbill in evidence (G. C. Exh. 3 and R. Exh. 2). The record does not clearly establish whether only one version, and if so, which version, was distributed during the events in question here. The only substantial difference between the two versions is the language in brackets.

WE NEED YOU—THE GENERAL PUBLIC—
TO
PROTECT THE LIVING & WORKING
STANDARDS
ESTABLISHED BY THE
LOCAL COLLECTIVE BARGAINING
AGREEMENT OF THE VARIOUS BUILDING
TRADES IN THIS AREA.
YOUR COOPERATION IN NOT
PATRONIZING
GREAT AMERICAN/VICTORY MARKETS
WILL BE GREATLY APPRECIATED

b. *Analysis and conclusions*

The judge found it unnecessary to evaluate the testimony regarding which particular handbills were distributed, what was contained in them, and whether they were "totally truthful." But after reporting the testimony of Respondent Victory's assistant vice president, Toomey, that the Union would not have been given permission to handbill on Respondent Victory's property because, according to Toomey, the handbills "weren't accurate or truthful," the judge added that, in *his* observation, the handbills were "at least somewhat misleading and not thoroughly investigated." As previously stated, Respondent Victory has asserted in its exceptions that the handbills were false.

As a general rule, nonemployee area standards/customer boycott handbilling like here is protected by Section 7 of the Act.[5] In such cases, where there is an issue about whether asserted area standards activity is statutorily protected, the Board normally does not look beyond the communication the union is conveying to consumers. Thus, if the message on the union's handbill indicates that an employer is undermining the collectively bargained wage and benefit standards in the area, and if the union's conduct in conveying this message is peaceful and consistent with the nature of the message, i.e., the union's activity is ostensibly in support of area wage and benefit standards, the Board will find, prima facie, the union's activity to be protected by Section 7 of the Act.[6] At that point, it is the respondent employer's burden to establish, if it can, that the union's activity is not what it appears to be and that it is outside the sphere of Section 7 protection.[7] In the circumstances here, Respondent Victory could attempt to establish that its wage and benefit policies actually were not substandard, or that the handbills were false in some other significant way, and that the Union was aware, or should have been aware, of any such falsehoods.

Applying this framework for analysis, we find that the handbills bore a clear area standards message, and that nothing in the Union's conduct of the handbilling suggested anything other than peaceful area standards activity. Accordingly, at least at this point in our analysis, we find, prima facie, the Union's handbilling to be protected by Section 7. Thus, we turn to an assessment of whether the Respondent has affirmatively established that the handbilling activity was unprotected.

(1) Asserted untruthfulness and inaccuracy of the handbills

The first question is whether Respondent Victory has established that wage and benefit policies on its Cooperstown project actually were not substandard, or whether the handbills were false in some other significant way. We find that the Respondent has not met this burden.

With regard to the accuracy of the statements on the handbills, although Union Business Manager Seward first testified on cross-examination that he was not positive that Fred West actually worked on the Cooperstown project, he immediately thereafter testified, in obvious reference to the Cooperstown project, that he knew that Fred West "was up there laying blocks, I had people on the job that would see him there." He subsequently testified with specificity that Fred West had done the concrete footings to start the Cooperstown project, using about six to eight employees, and that he had seen them on the job.[8] Seward also testified that, to the best of his knowledge: (1) Smith Contracting did hire employees who were not from central New York, including two employees who had been sent from New York City, and one from Binghamton, but none of whose names Seward knew or remembered; (2) he did not know of any contractors on the Cooperstown project who came from outside of New York State; (3) he did not remember the names of any employees on the Cooperstown project who were paid substandard wages; and (4) he did not know anyone who was paid $4.25 per hour.

Respondent Victory's assistant vice president, Toomey, testified that: (1) he did not have any facts which would have indicated to him that substandard wages were being paid on the project or that people were working "off the books"; (2) to his knowledge, James A. Smith Contracting, Inc., the general contractor on the project and its subcontractors paid prevailing wage rates on the Cooperstown project; and (3) none of the employees of the subcontractors on the project were paid $4.25 per hour. But Toomey also testified

[5] See *Food For Less*, 318 NLRB 646 (1995). See also *Oakland Mall*, 316 NLRB 1160, 1162–1163 (1995) (customer boycott handbilling); *Loews L'Enfant Plaza Hotel*, 316 NLRB 1111 (1995) (area standards/customer boycott handbilling); *Drexel Co.*, 316 NLRB 1103 (1995) (area standards/customer boycott handbilling).

[6] *Food For Less*, 318 NLRB at 648.

[7] Id.

[8] Union member Stephen Zukaitis, who handbilled at Cooperstown on December 30, testified without elaboration or contradiction that a Fred West company was on that site.

that: (1) he did not know what the prevailing wage rate actually was; (2) he was not "familiar" with how many subcontractors were on the project, or who they were; and (3) specifically he did not know who Fred West or Hy-Time Construction were.

James Smith, principal of Smith Contracting, testified generally that: (1) he had no information that there was a Fred West subcontractor on the project; (2) prevailing rates or union wages were paid to the employees on the project; and (3) he did not know the names of any individuals who were paid $4.25 on the project, or who received illegal or "off the books" payments. Smith testified somewhat more specifically that the electricians on the project were "union employees," who were paid the prevailing rate; and that he believed that Hy-Time was a masonry and concrete subcontractor on the project that to his knowledge was unionized. But Smith also testified that he did not know whether Fred West was a subcontractor on the project or whether Hy-Time itself subcontracted any of its work on the project. And finally, Smith testified that during the approximately 6-month duration of the Cooperstown project, he was actually only present at the job site "possibly once every two months."

Respondent Victory does not assert any other evidence in its brief in support of its argument that the Union was not entitled to the protection of the Act, because "any number of statements in the handbills it distributed were false and defamatory."

Seward did not testify to any falsehoods in the handbills. Toomey testified in effect only that he had no reason to believe that the statements on the handbills were true. But he also testified that he did not know what the prevailing wage rate actually was, and that he did not know the names of all of the subcontractors on the project, or, indeed, how many subcontractors there were. Smith testified in effect, but without specificity, that some of the statements on the handbills were not true, or at least that he had no knowledge that they were true. But he also testified that he did not know whether Hy-Time subcontracted any of its work, and that he did not know whether Fred West was even a subcontractor on the project. And, significantly, Smith's testimony shows that he only infrequently visited the project site. We find that the above testimony does not affirmatively establish that statements on the handbills were false, and that Respondent Victory therefore did not meet its burden in this regard.

(2) Actual or constructive knowledge by the Union of any untruths or inaccuracies in the handbills

Even assuming arguendo that Respondent Victory had established that the handbills were false, in order for the handbilling to be found unprotected by the Act, Respondent Victory would also have had to establish that the Union was or should have been aware of any such falsity. We find that Respondent Victory did not carry this burden. Union Business Manager Seward testified that he contacted Smith Contracting to find out whether it was going to bring in workers from outside of the local area to work on the Cooperstown project, that he was told that Smith Contracting had given that work to Hy-Time Construction,[9] that he contacted Hy-Time and was told that it paid approximately $6 to $8 per hour in wages with no benefits,[10] that Hy-Time also informed him that it had subcontracted some masonry work on the project to Fred West Construction, and that he contacted Fred West and was told that it was going to pay approximately $7 to $8 per hour on the project and that its employees were being paid "off the books."

On December 21, Seward sent Respondent Victory and Smith Contracting copies of the handbills (set out in pertinent part above) that the Union intended to distribute and asked them to notify the Union within 24 hours if any of the information on the handbills was incorrect. The next day, Respondent Victory's attorneys notified the Union in writing, in pertinent part, that the handbill was "inaccurate by reason of, among other things, the misstatements that 'substandard wages and fringe benefits' are being paid; that James A. Smith Contracting, Inc. is not from the upstate region; and that various workers have been 'import[ed].'" The letter was not more specific about the asserted inaccuracy and misstatements. On the same day, Smith Contracting notified the Union in writing that "the allegations and spurious claims delineated in [the Union's] correspondence are libelous and malfeasant regarding" Smith Contracting. The letter suggested that the Union retract all of the "libelous and defamatory statements." The letter was not more specific about the asserted libels and defamations.

The following day, December 23, the Union replied with identical letters to both Respondent Victory's attorneys and to Smith Contracting, expressly disagreeing with their claims that there were misstatements in the handbills and asserting that Seward had personally investigated the question of substandard wages and benefits and had obtained reliable information that they were in fact substandard and that Smith and some employees were from out of town.

[9] Smith testified that he did not recall this telephone conversation with Seward.

[10] As noted by the judge in the second paragraph of sec. III of his decision, Seward's testimony about what he was told during his conversations with contractors and subcontractors on the Cooperstown project was objected to as hearsay and was not accepted into evidence for the underlying truth of what he was told. Seward's testimony in this regard, however, about what he was told during his investigation, is relevant to the issue of whether the Union was or should have been aware of any falsehoods in its handbills—falsehoods which, in any event and as discussed above, Respondent Victory has not established.

We find that the evidence does not contradict Seward's assertion that he investigated the facts asserted in the handbill prior to their distribution and does not establish that the Union was aware or should have been aware of any alleged untruths in the handbills. Accordingly, we find that Respondent Victory did not meet its burden in this regard either.

Finally, the Respondents do not argue—and in any event there is no evidence—that there was any organizational or recognitional objective that could have underlain the area standards/customer boycott purpose of the handbilling.[11] Accordingly, we find, based on the totality of the evidence, that the handbilling was protected by Section 7 of the Act.[12]

3. Handbilling at Cooperstown on December 23

a. *Facts*

The Cooperstown store is freestanding, with a parking lot separating it from Chestnut Street, the bordering roadway in front of the store. There are three driveway entrances into the parking lot—two on Chestnut Street, and another on a street bordering a side of the parking lot.

The handbilling took place in the area where Respondent Victory's parking lot abuts Chestnut Street. Union Representative Jon Erikson and some other individuals stood on the curb at the entrance to the parking lot and offered handbills to people in cars as they entered the parking lot. Shortly thereafter, a police officer approached the handbillers and told them that the police had received a complaint that the handbilling was blocking traffic onto Chestnut Street. The police told the handbillers that they would have to leave, which they did.

Erikson then told Union Business Manager Seward what happened. Seward told Erikson that he had a right to handbill where he had been, and Seward instructed Erikson to return there and resume handbilling, which he did. When Cooperstown Store Manager Cecil Reynolds saw that the handbilling had resumed, he called the police and told them that the handbillers had returned and that he wanted them to cease stopping traffic and to get off Respondent Victory's property. The police returned to the store. They told Erikson that the store manager had complained about the handbilling, and they warned him that he would be arrested unless he left, which he did.

In preparing for the handbilling at Cooperstown on December 23, Seward had instructed the handbillers to "stand in a public right-of-way." The record does not clearly establish whether the handbillers were standing on public or private property. When Reynolds was asked at the hearing whether there was a pedestrian sidewalk "in the area" of where the store parking lot abuts Chestnut Street, he replied only that between the two Chestnut Street driveway entrances/exits for the parking lot, "there is a curb in front of the store" and that "there is activity back and forth from the school to there." Reynolds testified that the handbilling was being conducted on what he described as "store property," at the entrance to the parking lot, "where they were coming in, and activity across the front of those entrances."

Reynolds further testified that before both the first and second eviction of the handbillers by the police he observed the handbillers "stopping traffic," and, more specifically, that when the handbillers returned after the first eviction he reported to Respondent Victory's Vice President for Security Donald Schel that the handbillers were on company property and were restricting traffic flow into the store's parking lot.

Reynolds and Erikson were the only two participants in the events at Cooperstown on December 23 to testify. Erikson testified, without explanation or elaboration, that the grassy area at the end of the parking lot, where it abuts Chestnut Street, is a public right-of-way. Erikson further testified that the police told him that the handbillers all had to leave, because the police had received complaints that they were creating a traffic problem by stopping traffic and backing it up out onto the main street: "So, we left. . . . They said that we were causing a traffic jam. . . . Doesn't mean its true."

b. *Analysis and conclusions*

The judge found that Respondent Victory did not violate the Act by summoning the police to evict the handbillers from the entrance to the parking lot. We agree with the judge, for the following reasons.

Respondent Victory cannot assert a property interest to justify causing the handbillers to be evicted from in front of the parking lot, because it has failed to establish, among other things, that they were trespassing on Respondent Victory's private property.[13] As previously noted, the record does not permit us to conclude that the December 23 handbilling took place on private

[11] *Food For Less*, 318 NLRB at 649.

[12] In so finding, we do not pass on the judge's discussion in the first two paragraphs of sec. IV, Analysis, of his decision (i.e., through the paragraph that ends with "access to Respondents' premises").

[13] See, e.g., *Bristol Farms*, 311 NLRB 437 (1993) (employer's exclusion of union representatives from public property violates Sec. 8(a)(1) if union representatives are engaged in activity protected by Sec. 7); *Barkus Bakery*, 282 NLRB 351 fn. 2 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987 (employer's attempt to eject union organizers from property not its own violated Sec. 8(a)(1); protected activity).

Member Cohen does not agree that the Respondents have the burden of establishing that the handbillers were on private property. However, irrespective of whether the property was private or public, he agrees with his colleagues that the conduct of the handbillers was such as to justify the Respondents' efforts to remove them.

property. Thus, for purposes of further analysis, we shall assume that the handbillers were not trespassing on Respondent Victory's private property.[14]

We find under the circumstances, however, and in agreement with the judge, that Respondent Victory was nevertheless justified in summoning the police to evict the handbillers from the area in which they were handbilling on December 23, because the preponderance of the evidence does show that the handbillers were causing interference with vehicular traffic entering the parking lot and causing traffic to back up onto Chestnut Street. In addition, the record shows that they were infringing on Respondent Victory's private property interest of enabling its customers to have unimpeded entry onto its parking lot.[15] Thus, notwithstanding Erikson's attempt to leave open a question about whether the handbillers were in fact blocking traffic into the lot and causing it to back up into the main street,[16] neither he nor the General Counsel or the Union have actually disputed this contention. We find, therefore, that the record satisfactorily establishes that the handbilling at Cooperstown on December 23 caused traffic to be blocked from entering the lot and to be backed up into the street, thus creating a potentially dangerous traffic condition and also infringing on Respondent Victory's private property rights. Consequently, we find that Respondent Victory legitimately attempted under these circumstances to have the handbillers removed from that location. Accordingly, we find that the record establishes that Respondent Victory did not violate the Act as alleged in regard to its conduct at Cooperstown on December 23.

4. Handbilling at Cooperstown on December 29 and 30

We agree with the judge that the evidence fails to establish that Respondent Victory was responsible for having the handbillers evicted by the police at Cooperstown on December 29 and 30, and we thus affirm his recommended dismissal of the allegation involving these events.

5. Handbilling at Southside Mall in Oneonta on December 23

a. *Background*

Respondent Victory's Oneonta store is located in the Southside Mall, which is managed by Respondent Concord. Respondent Victory leases the store from Respondent Concord. Respondent Victory's assistant vice president, Robert Toomey, testified that the sidewalk area immediately in front of the Oneonta store is not part of the mall's common area, and that under the lease Respondent Victory has sole control over the entire sidewalk area in the vicinity of the store. Toomey testified further that the property immediately in front of the Oneonta store is Respondent Victory's property, and that section 11.6 of the lease (excerpted in pertinent part below) gives Respondent Victory control over and the ability to govern the circumstances relating to the property immediately in front of the Oneonta store. According to Toomey, "[t]his was an addition to the original contract." He also testified, however, that he had not discussed this subject with Respondent Concord: "I have no reason to. It's understood."

The lease provides in pertinent part:

> ARTICLE XVII, CERTAIN ADDITIONAL DEFINED TERMS
>
> (a) "Common Areas" means the portions of the Shopping Center which, at the time in question, have been designated and improved for common use by, or for the benefit of, more than one (1) Occupant, including, without limitation . . . the land and facilities utilized for or as parking lots . . . access and perimeter roads . . . landscaped areas; *exterior walks* . . . . [Emphasis added.]
>
> ARTICLE I, CERTAIN LEASE PROVISIONS AND DEFINITIONS
>
> A. *Demised Premises*: the land and Tenant's [Respondent Victory's] Building . . . TOGETHER WITH the rights in common with the other tenants in the Shopping Center, the Landlord [Respondent Concord] and others, their customers, employees, licensees and invitees to use the Common Areas (as hereinafter defined [i.e., in ARTICLE XVII, set out above]) within the Shopping Center for their intended uses and purposes;
>
> ARTICLE XI, COMMON AREAS
>
> SECTION 11.4. No merchandise shall be sold or displayed in the Common Area. Notwithstanding the foregoing, any occupant of the Demised Premises may use the sidewalk adjacent to the De-

[14] The record establishes that the handbillers did not attempt to handbill on Respondent Victory's property immediately in front of the store. Thus, contrary to the complaint allegation, there is no basis in the record to find that Respondent Victory discriminatorily prohibited the handbillers from handbilling at that location.

[15] Cf. *Johnson & Hardin Co.*, 305 NLRB 690 (1991) (employer's expulsion of nonemployee union handbillers from public property unlawful, where employer had only an easement for ingress and egress and where handbilling in question posed minimal if any interference with employer's right to use the public property for ingress and egress), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

[16] "They said that we were causing a traffic jam. . . . Doesn't mean its true."

> mised Premises for the storage of shopping carts, may erect a cart corral or similar device thereon.
>
> SECTION 11.6. All Common Areas shall be subject to the exclusive control and management of Landlord, and Landlord shall have the right, at any time and from time to time, to establish, modify amend and enforce uniform rules and regulations with respect to the Common Areas and the use thereof. Tenant agrees to abide by and conform with such rules and regulations upon notice thereof, and to cause its Concessionaires, invitees and licensees and its and their employees and agents, so to abide and conform
>
> . . . .
>
> Landlord shall have the right . . . (b) to close temporarily all or any portion of the Common Areas to discourage non-customer use . . . and (e) to do and perform such other acts . . . in, to, and with respect to, the Common Areas as in the use of good business judgment Landlord shall determine to be appropriate for the Shopping Center.

b. *Facts*

Stephen Zukaitis began handbilling on the sidewalk immediately in front of the store, about 10 feet from the doors, at about 8:30 a.m. After about 10 minutes, Respondent Victory's store manager told Zukaitis that he could not allow Zukaitis to be there, and that he would call the police and have him arrested if he did not leave. Zukaitis told the store manager that he thought he was allowed to be there, but the manager said he was not, and Zukaitis then left the premises.

About 3 p.m., Erikson began handbilling from essentially the same place at which Zukaitis had been handbilling that morning. After about 30 minutes, Respondent Victory's director of loss prevention, Robert Stothers, came out, escorted Erikson into the store, and told him that he was not allowed to be there, that he was trespassing, and that he would have to leave. Erikson left the premises.

After his conversation with Erikson, Stothers reported this incident to Respondent Concord's regional manager, David Downie. According to Stothers,[17] Downie told him that "if anybody came back, I had to go through him. . . . He wanted to be involved. . . . He told me to notify him personally and that he would take care of it" if the handbillers returned. Downie, according to Stothers, also said that representatives of Respondent Victory had no authority under the lease to have people removed from the area in the vicinity of the store.[18] Downie also called Seward at this time, in Stothers' presence, and (according to Stothers) "made it quite clear that this was a situation that he did not want to have, . . . [and] that if anybody came back, I had to go through him." Seward testified that in this conversation Downie told him that he did not want any handbilling on Respondent Concord's property in front of Respondent Victory's store, and warned him that he would have the handbillers arrested if they did not leave.

c. *Analysis and conclusions*

In cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property.[19] Applying this principle, the judge found, and we agree, that, under the express terms of the lease, Respondent Victory did not have the requisite property interest in the sidewalk in front of its store that would have given it the right legitimately to exclude the handbillers from that area. In adopting the judge's decision in this respect, we additionally rely on Stothers' admission that Respondent Concord's regional manager, Downie, expressly told him that representatives of Respondent Victory had no authority under the lease to have people removed from the area in the vicinity of the store.

Respondent Victory contends that Respondent Concord expressly imbued it in the lease with authority generally to regulate the use of the sidewalk immediately in front of its store, by virtue of that part of section 11.6 of the lease which states "Tenant agrees . . . to cause its Concessionaires, invitees, and licensees and . . . their employees and agents . . . to abide [by] and conform" with "uniform rules and regulations with respect to the Common Areas and the use thereof." Respondent Victory argues that under this language it had a sufficient possessory interest in the sidewalk in front of its store to preclude third parties from failing to abide by Respondent Concord's permit process for handbilling. More specifically, Respondent Victory argues that it was expressly authorized by—indeed, obligated to—Respondent Concord to cause the handbillers (whom Respondent Victory likens to its invitees and licensees) to abide by the rules pertaining to the use of the common areas—including obtaining Respondent Concord's permission to handbill. Respondent Victory does not cite any precedent in support of this contention. Further, we find this argument to be unsupported by the facts.

The key inquiry in regard to this aspect of the case is whether Respondent Victory had a property interest

[17] Downie did not testify.

[18] Toomey testified, without explanation or elaboration, that what Downie told Stothers about Respondent Victory having no authority to have people removed from the area in the vicinity of the store was "inaccurate."

[19] *Food For Less*, 318 NLRB at 649–650.

in the common areas of the shopping center, and particularly in the sidewalk immediately in front of its store, which would entitle it to exclude individuals from that area. Section 11.6 of the lease states that "[a]ll Common Areas shall be subject to the exclusive management and control of Landlord." Article XVII (a) of the lease states that "Common Areas" includes "exterior walks," which would include the sidewalk immediately in front of Respondent Victory's store. Thus, the sidewalk immediately in front of Respondent Victory's store is subject to the exclusive control of the landlord, not Respondent Victory. Nor does Respondent Victory's agreement in the lease to "cause" its concessionaires, invitees, and licensees to obey the landlord's rules governing use of the sidewalk convey to Respondent Victory a *property interest* in that sidewalk. As to the Respondent's claim that it was obligated to ensure that its concessionaires, invitees, and licensees obey the landlord's rules, that obligation cannot reasonably be found to cover the union handbillers, who come within none of the three listed categories.

Finally, Respondent Victory also argues that in light of Downie's telephone conversation with Seward following the handbilling, Respondent Concord ratified and condoned Respondent Victory's eviction of the handbillers. We find this argument to have been particularly belied, however, by Downie's express instruction to Stothers, *following* the eviction of the handbillers, that representatives of Respondent Victory had *no* authority under the lease to have people removed from the area in the vicinity of the store.[20]

Accordingly, we find that Respondent Victory violated Section 8(a)(1) by prohibiting the handbillers from handbilling in front of its Oneonta store.[21]

In light of our affirmation of the judge's finding that Respondent Victory violated Section 8(a)(1) by prohibiting the handbillers from handbilling directly in front of the Oneonta store, we find it unnecessary to decide the question of whether Respondent Victory also violated Section 8(a)(1) by discriminatorily prohibiting handbillers from handbilling directly in front of its Oneonta store, because the finding of any additional 8(a)(1) violation based on this same incident would be cumulative and would not affect the remedy.

6. Handbilling at Southside Mall in Oneonta on December 30[22]

a. *Facts*

Union members Glenn Sullivan, Bruce Kellog, and Stephen Zukaitis, and Brian Andrews, a member of another union, handbilled in the parking lot and in front of the Oneonta store on December 30. About 3 p.m., a police officer arrived, told the handbillers that she had a "signed deposition from the mall manager that said she could arrest [them] immediately if [they] did not leave the premise," and ordered them to leave immediately. Zukaitis challenged the legitimacy of the officer's instructions, and the officer agreed to check with her supervisor, but told them that she would probably return, and that if the handbillers were there she would probably arrest them. After she left, the handbillers discussed the situation and decided to leave the premises because of the fear of being arrested.[23]

As the judge found, the Respondents have procedures wherein organizations (principally nonprofit or charitable) are given permission to use the Respondents' facilities for fundraising or public awareness programs. Respondent Concord has permitted numerous outside activities to be conducted in the mall. Union Representative Zukaitis observed musical societies doing Christmas gift wrapping to raise money; the Salvation Army soliciting donations (also observed by Union Representative Erikson); and automobile and motorcycle dealerships selling vehicles. Union Business Manager Seward testified without objection or contradiction that Respondent Concord's regional manager, Downie, acknowledged to him in December that

[20] We are unpersuaded by Toomey's unsubstantiated testimonial claim that Downie's statement to Stothers was "inaccurate," that there was "an addition to the original contract," and that these matters are "understood" between Respondents Victory and Concord. We find Toomey's conclusory testimony in these regards to be contradicted by the express terms of the lease, and we particularly note in this context sec. 21.18 of the lease, which states:

> There are no oral agreements between the parties hereto affecting this lease, and this lease supersedes and cancels any and all previous negotiations, arrangements, agreements, and understandings, if any, between the parties hereto with respect to the subject matter hereof, and none thereof shall be used to interpret or construe this lease.

[21] *Food For Less*, supra.

As noted previously, Member Cohen does not agree that the Respondent has the burden of establishing initially that the handbillers were on private property. Rather, once the General Counsel has established that the handbillers whom the Respondent ejected were engaged in Sec. 7 activity, Member Cohen would require the Respondent to show that it had a colorable property right. The burden at that point would shift back to the General Counsel to show that the Respondent did not have a property right. Applying that analysis here, Member Cohen finds that, assuming arguendo that the Respondent showed that it had a colorable property right, the General Counsel satisfied his burden and established that the Respondent did not have a property right ot exclude the handbillers.

[22] Only Respondent Concord, not Respondent Victory, is alleged to have committed unfair labor practices at the Oneonta store on December 30 and 31.

[23] Sullivan testified about a similar sequence of events also taking place at the Oneonta store the next day, December 31. The judge found that Sullivan was probably referring to the events of the previous day, December 30. Based on our review of the record, we accept the judge's assessment of the nature of Sullivan's testimony about the events that Sullivan places on December 31, and we make no finding about whether Respondent Concord independently violated the Act on December 31. In any event, in light of our finding below that Respondent Concord violated the Act as alleged on December 30, a finding of similar unlawful conduct on December 31 would be cumulative and would not affect the remedy.

the Chamber of Commerce and either the Heart Fund or the Cancer Fund had solicited funds or distributed literature in the mall. Moreover, Seward himself observed a circus set up in the mall parking lot in the summer of either 1991 or 1992.[24]

Finally, Seward testified about two telephone conversations he had with Respondent Concord's regional manager, Downie, in late December. Around December 23, Downie called Seward and told him that he did not want any handbilling on mall property in front of Respondent Victory's Oneonta store, and that he would have the handbillers arrested if they did not leave. In this or a subsequent phone call, Seward told Downie that he knew of a number of other organizations that were permitted by Respondent Concord to use the mall. Downie replied, "Well, you're different from any other—collecting money or to take—raise money and you're in there protesting. We don't have no protesters on our property." After Downie named several different organizations that had used the mall, he told Seward, "[N]one of them [is] passing out union materials." According to Seward, Downie "didn't want them passing out union material . . . [Downie] said [the other groups] were there collecting funds or giving out literature from [sic] the good, I guess, and he didn't want the union there because they're protesting, and they didn't want anybody on the mall protesting."

In a subsequent telephone conversation between Seward and Downie around December 30, Downie reminded Seward of their earlier conversation, and told Seward that "he wanted to let me know that he wasn't kidding around, that he was definitely going to have all the handbillers or leafletters arrested if they didn't leave the property, whether it was up at Great American, or down at the entrance to the mall, or the public right-of-way."

b. *Analysis and conclusions*

In the final paragraph of section IV of his decision, the judge found that Respondent Concord violated Section 8(a)(1) of the Act when Downie threatened to have the handbillers and leafletters arrested if they did not leave the public right of way. We agree.[25]

In the penultimate paragraph of section IV, however, the judge found that Respondent Concord could lawfully require the handbillers to leave Respondent Concord's private property, that there was no evidence that the handbillers at Oneonta that day were on public property, and that Respondent Concord therefore did not violate the Act by demanding that the handbillers leave Respondent Concord's property on December 30.

We disagree. It is well settled that an employer may validly post his property against nonemployee distribution of union literature *if*, among other things, the employer does not discriminate against the union by allowing other distribution.[26] Applying this principle to the facts of this case, we find that Respondent Concord engaged in just such discrimination against the Union here. The evidence discussed above establishes that Respondent Concord repeatedly permitted the use of its property for a wide range of charitable activity, and even some commercial activity, unrelated to the operation of the mall itself, but that it prohibited the Union from engaging in the protected handbilling activity in question.[27] And yet the only reason it offered to the Union for not permitting it the same access it permitted the other organizations was that, as Downie straightforwardly told Seward, the Union was "different" from those other organizations, because the Union was "protesting" and handing out union materials.

Under these circumstances, we find that Respondent Concord's conduct in prohibiting the Union from engaging in the handbilling in question constitutes unlawful disparate treatment of protected union activity, in violation of Section 8(a)(1) of the Act.[28] And we find that this violation is made even more clearly evident by Respondent Concord's admitted antiunion explanation for its conduct.[29]

[24] We do not rely on the judge's reference to local newspaper items about an information booth in the mall to provide literature distributed by Students Against Drunk Driving and slot car races in the mall to benefit the American Heart Association. The events referred to in these newspaper items took place in December 1993 and January 1994, respectively, about a year after the December 1992 events in question here, and about 7 months after the issuance of the complaint on April 28, 1993.

[25] There are no exceptions to this finding.

[26] *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956).

[27] Thus, we find that Respondent Concord has gone beyond merely permitting a small number of isolated beneficent solicitations on its property. Rather, we find that the use of Respondent Concord's property by other organizations has been shown to be sufficiently frequent as to establish Respondent Concord's disparate treatment of the Union's handbilling. See *Be-Lo Stores*, 318 NLRB 1, 10–12 (1995).

Whether or not the Union complied with Respondent Concord's procedures for obtaining permission to solicit on mall premises is irrelevant. The record clearly establishes that had the Union sought permission to engage in handbilling, that permission would have been denied for unlawful reasons.

[28] See *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993); *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993); *D'Alessandro's, Inc.*, 292 NLRB 81 (1988). See also *Be-Lo Stores*, supra (disparate enforcement of no-solicitation rule).

[29] See *Riesbeck Food Markets*, 315 NLRB 940 (1994), enf. denied No. 95–1766 (4th Cir. July 19, 1996) (unpublished per curiam opinion).

Chairman Gould and Member Browning respectfully disagree with the court's holding, in denying enforcement of the Board's order in *Riesbeck*, that an employer does not discriminate against union distributions by prohibiting a union's do-not-patronize solicitations while allowing various other civic and charitable groups to solicit its customers. They also note that here the Respondent permitted some commercial entities to solicit its customers on its property.

Member Cohen dissented in *Riesbeck* on the ground that the employer there was not discriminating on the basis of Sec. 7 activity.

CONCLUSIONS OF LAW

1. The Respondents are each engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting the handbillers from handbilling in front of its Oneonta store in the Southside Mall on December 23, without having a property right in the premises entitling it legitimately to do so, Respondent Victory violated Section 8(a)(1) of the Act.

4. By threatening on December 29 or 30 to have the handbillers arrested if they did not leave the public right of way adjacent to the Southside Mall, and by discriminatorily prohibiting the Union from handbilling on Respondent Concord's property on December 30, Respondent Concord violated Section 8(a)(1) of the Act.

ORDER

A. Respondent Victory Markets, Inc. d/b/a Great American, Utica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting handbillers from handbilling in front of its Oneonta store in the Southside Mall without having a property right in the premises entitling it legitimately to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Great American stores in Cooperstown and Oneonta, New York, copies of the attached notice marked "Appendix A."[30] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 1993.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent Concord Asset Management, Oneonta, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to have handbillers arrested if they do not leave the public right of way adjacent to the Southside Mall.

(b) Discriminatorily prohibiting the Union from handbilling on Respondent Concord's property.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Southside Mall location in Oneonta, New York, copies of the attached notice marked "Appendix B."[31] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 1993.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

In that regard, he noted, inter alia, that the employer permitted the union activity of solicitation. By contrast, the Respondent here objected to the fact that the *union* materials were distributed. Further, unlike *Riesbeck*, there is no evidence that the Respondent permitted any kind of union activity. Thus, the Respondent discriminated on the basis of union activity.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[31] See fn. 30 above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit handbillers from handbilling in front of our Oneonta store in the Southside Mall without having a property right in the premises entitling us legitimately to do so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

VICTORY MARKETS, INC. D/B/A GREAT AMERICAN

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to have handbillers arrested if they do not leave the public right-of-way adjacent to the Southside Mall.

WE WILL NOT discriminatorily prohibit union representatives from handbilling on our property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CONCORD ASSET MANAGEMENT

Robert Ellison, Esq., for the General Counsel.
Douglas P. Catalano, Esq. (Catalano & Sparber), for Respondent Victory Markets.
James Konstanty, Esq., for Respondent Concord.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 8, 1993, and February 3, 1994, in Albany, New York. The consolidated complaint here issued on April 28, 1993, and was based on unfair labor practice charges and an amended charge that were filed on January 19 and April 26, 1993, by United Brotherhood of Carpenters and Joiners of America, Local Union 258, AFL–CIO (the Union). The consolidated complaint alleges that Victory Markets, Inc., d/b/a Great American (Respondent Victory), which operates grocery stores in cities in the State of New York, including Cooperstown and Oneonta, New York, violated Section 8(a)(1) of the Act by discriminatorily prohibiting representatives of the Union from picketing in the parking lot in front of its stores (the Cooperstown store on December 23, 29, and 30, 1992,[1] and the Oneonta store on December 23, 30, and 31) by demanding that they leave the premises and by causing the police to threaten them with arrest. It is alleged that Concord Asset Management (Respondent Concord) committed similar violations of the Act on December 23, 30, and 31 at the Oneonta store, located in the Southside Mall Shopping Center, which is managed by Respondent Concord.

FINDINGS OF FACT

I. JURISDICTION

Respondent Victory, a New York corporation with its principal office in Utica, New York, has been engaged in the business of a grocery store chain. Annually it derives gross revenue in excess of $500,000 and purchases and receives goods and services valued in excess of $50,000 from points located outside the State of New York. Respondent Victory admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Concord, a division of Concord Assets Group, Inc., a Delaware corporation, has been engaged in the business of acquiring and managing shopping centers, including Southside Mall in Oneonta, where Respondent Victory's Oneonta store is located. Annually in the course of its operations, Respondent Concord derives gross revenue in excess of $50,000 from enterprises at the Southside Mall that are directly engaged in interstate commerce, including Respondent Victory and Kmart, for providing services to such enterprises. Respondent Concord admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent Victory and Respondent Concord (collectively Respondents) each admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

As stated above, Respondent Victory operates supermarkets throughout New York State. The only two involved herein are the stores in Cooperstown and Oneonta, New York, the sites of union solicitations to protest alleged nonunion and substandard wages paid by contractors on work being performed to remodel the Cooperstown store. Respondent Concord is involved here because of its management of the Southside Mall, where Respondent Victory's Oneonta store is located.

Aaron Seward, business manager for the Union, testified that in mid-November he learned that Jim Smith Contracting, a Long Island, New York firm, had been made the general contractor of the job at the Cooperstown facility. He was concerned at this development, fearing that local people

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1992.

would not obtain employment at the facility and that Smith was "going to import people from other places." He testified to conversations that he had (objected to as hearsay and not accepted for the truth of the contents) that convinced him that contractors at the store were going to employ out of area employees and pay them minimum wage. Whether these allegations were true or not, it resulted in the Union leafleting customers of the Cooperstown and Oneonta stores on certain days in late December.

The Cooperstown store is a free-standing store with a sidewalk at its entrance and a parking lot between it and the access road. There are three means of access to the store, each with an entrance and exit lane; two of these are in the front and one is on the side of the store. One of these entrances has a concrete island separating the entrance and exit lanes. Southside Mall has about 32 stores. There is an entrance to the mall with access to all the stores, and a separate entrance to Respondent Victory's store, which is on the far left end of the mall. A sidewalk, apparently, runs the full length of the mall. Between these stores and Route 23 is a large parking lot with one main entrance/exit and one less-used exit (because only right-hand turns are permitted) near Respondent Victory's store. A grassy area of a depth of about 10–15 feet separates the parking lot and Route 23 and appears to run the full length of the mall. The main entrance/exit leading to Route 23 has about an 8-foot-wide median separating the two lanes.

Jon Erikson, a member of the Union, testified that he went to the Cooperstown store on December 23 at 10 a.m. He had previously been told by Seward to go to the store and distribute the handbills at the entrance to the store.[2] He and some other individuals stood on the curb at the entrance to the parking lot and offered the leaflet to individuals in cars as they entered the parking lot. He testified that he considered this a public right-of-way. Shortly thereafter, a police officer approached them and said that they had received a complaint that they were blocking traffic into the main road and they would have to leave, which they did. He then called Seward, who told him that he was within his rights in leafleting where he was, and that he should return to where he was, and he did. None of the others who had been leafleting returned. He returned to the same area where he had been earlier, and "it didn't take very long" before the police returned, this time with Police Chief Michael Crippen. He testified that they said that a complaint was made by Cecil Reynolds, the manager of the Cooperstown store (in testimony that was objected to as hearsay) and that unless he left, he would be arrested; he left. During the two periods that he was distributing leaflets from this location, he handed out almost 100 leaflets. Robert Toomey, assistant vice president for Respondent Victory, testified that Donald Schel, Respondent Victory's vice president for Security, told him that the leaflets were removed by the police that day due to their interference with the traffic flow, based on a complaint, but that Respondent Victory had not directed that they be removed.

Reynolds testified that he was first made aware of the leafleting by a customer who complained that she was almost involved in an accident because, as she was entering the parking lot, somebody stuffed a paper in her car window. He looked outside and saw some people distributing leaflets with a police officer at the scene. When he first observed them they were "at the top of the entrance to the store where they were coming in." He testified that this was "store property," not public property. He watched, and the police officer left and the leaflets left as well. About an hour later, two leafleters returned to the same location that they had been stationed at earlier. Reynolds called Schel and told him that they had returned. Schel asked if they were on company property and if they were restricting traffic flow into the store, and he answered yes to each question. Schel said, "In that case, call the police department and have them removed." Reynolds called Chief Crippen and told him that the leafleters were back and that he didn't want them stopping traffic and wanted them off the company's property. About 5 minutes later he observed Chief Crippen with another officer talking to them. After that discussion the leafleters left. Crippen told Reynolds that he told them that they could distribute their literature "on the top part of the curb," closest to the road, the public property, which they did on another day, without incident. Seward testified that after he received the call from Erikson that the police told them to leave on the first occasion, he told Erikson that they had a right to distribute literature on the public right-of-way. When Erikson was told to leave for the second time that day, he gave Seward Chief Crippen's name. When Seward spoke to Crippen, and complained about Erikson being forced to leave, Crippen told him (in hearsay testimony not accepted for the truth) that he had received a complaint from Reynolds. Seward testified that from this day for through about the following 7 days, they distributed about a thousand leaflets at the Cooperstown store.

Peter Marciano, a union member, distributed leaflets at the Cooperstown store on December 29. The only instructions that he received were from Seward, who told him to distribute the leaflets only at the exits and not to block traffic. He arrived at 10:30 a.m. with another union member and they handed out the leaflets at an exit from the parking lot. Marciano was at the northside of the driveway so that when cars exited the parking lot, he was on the passenger side of the cars. Shortly thereafter, the police arrived and told them that they were blocking traffic, and if they didn't leave, they would be arrested. They left. Marciano returned the next morning with Stephen Zukaitis, also a member of the Union. They went to the same places as he and the other union member were the prior day, an entrance/exit of the parking lot. Shortly thereafter, Police Officer Phillip Stocking approached them and said that they were obstructing traffic and trespassing and that they should leave or they would be arrested. They left. Zukaitis testified that he went to the Cooperstown store on the morning of December 30 with Marciano and another person. They were on a grassy area between the parking lot and the road, which Zukaitis referred to as "a public right of way," an area that pedestrians used. They were stationed underneath telephone poles, which he considered to be a public right-of-way, and "we each took a drive-

[2] There was a substantial amount of testimony regarding which handbills were distributed, whether they were totally truthful, and what was contained on them. I find it unnecessary to evaluate this testimony. What is relevant is that the leaflets requested that the patrons not shop at Respondent Victory's stores because they were not paying the "fair area prevailing wage rate," and were employing out of area or out-of-state contractors, who import workers and pay substandard wages, thereby depriving area people of fair employment.

way." Shortly thereafter, a police officer came and spoke to Marciano. After he left, Marciano told Zukaitis that the officer said that they would have to leave or they would be arrested, and they left.

Zukaitis also leafleted at the Oneonta store on December 23. Seward had previously instructed him to be courteous in distributing the leaflets and not to force them on anybody. He arrived at the mall at 8:30 that morning. He stood on the sidewalk in front of the store, about 10 feet from the doors leading into the store. About 10 or 15 minutes later he was approached by someone whom he recognized as the manager of the store who said that he could not allow him to be there and that he would call the police and have him arrested unless he left. Zukaitis said that he felt that he was entitled to be there, and he left. Erikson went to the Oneonta store about 3 p.m. that day; he had been told by Seward to leaflet at the front entrance of the store, and he stationed himself on the sidewalk, to the right of the doors leading into and out from the store. After distributing leaflets at this location for about 30 minutes, he was approached by Robert Strothers Jr., Respondent Victory's director of loss prevention, who took him into the store, gave him his business card, and told him that he would have to leave, which he did. Strothers testified that on December 23 he saw Erikson standing near the front entrance of the store with the Union's handbills. He approached Erikson and asked him for a copy of the leaflet that he was distributing, and Erikson gave it to him. He told Erikson: "I can't have you here," but that he could stand by the entrance to the parking lot. Erikson said that was all right with him and left. Before speaking to Erikson, he had been instructed by Schel and Toomey that he was to tell the leafleters that they could distribute their literature at the roadside entrance to the mall. Strothers informed David Downie, Respondent Concord's Regional Manager of the incident.

Glen Sullivan, a member of the Union, distributed the Union's leaflets at the Oneonta store on December 30 and 31. He had been told by Seward to distribute the leaflets at the front of the store, to the side of the doors leading into the store. He arrived about 9 a.m. on December 30 and met Brian Andrews, a member of another union, who was handing out leaflets at the front of the store. He told Sullivan that the mall manager told him that he was not supposed to be there and that the police would be called to remove him. Sullivan then went to the entrance to the parking lot, where he distributed his literature. At about 10 o'clock a State Trooper stopped by the entrance to the mall and told Sullivan that he couldn't distribute his literature from the lane where the cars entered the parking lot because it obstructed traffic and he could get hit. He told him to distribute his literature to cars exiting the parking lot, and Sullivan did so. At about 3 o'clock, Sullivan, Zukaitis, and union member Bruce Kellog were approached by State Trooper Brasier, who said that she had a signed deposition from the mall manager and that she could arrest them if they didn't leave the premises. Zukaitis spoke about their rights to be on the property and Officer Brasier said that she would return to her barracks to speak to her supervisor. Zukaitis went to the mall on that day and met with Sullivan and others who told him that the police had told them to get away from in front of the store. Shortly thereafter, Trooper Brasier arrived and said that she had a signed deposition from the mall manager and that she could have them arrested. Zukaitis told her that they had a right to distribute their literature and she suggested other places in town. Zukaitis said that those places were not appropriate because they wanted their message to get to Respondent Victory's customers. She said that she still felt that they could be arrested, but she wanted to first discuss it with her sergeant. When she left, the leaflets left as well. Kellog distributed leaflets at the parking lot exit only location on that day. Few cars drove by because it is a right-turn-only exit, and most of the mall's patrons turn left to return to Oneonta. After about 2 hours at this location, he joined Sullivan and Zukaitis at the main entrance/exit from the parking lot. Shortly thereafter, Trooper Brasier told them that she had a signed affidavit from the mall manager to have them removed from the area if they didn't leave. They told her that they had previously been instructed by another trooper where to distribute their handbills and they were following his orders. She left and they did so as well. Seward was present on this occasion when the first state trooper arrived and he complained to the trooper that his people were not allowed to distribute their literature. At that time, Downie approached them and the trooper said: "They have a right to be somewhere. We've got to find someplace for them." The trooper suggested that they use the right-of-way at the end of the parking lot by the road. Downie reluctantly agreed, "as long as they don't block any traffic or cause any problems." After that, the leaflets remained on the median between the entrance and exit lanes.

Sullivan testified that he returned to the Southside Mall on December 31 to the exit lane from the parking lot, where the state trooper told them to leaflet on the prior day. There was a meeting that day with the trooper, Downie, Seward, and the pickets where it was decided that they could leaflet cars leaving the parking lot in the main exit lane, and they did so. This testimony is similar to Seward's testimony of the events of the prior day, and it is probable that they are referring to the same incident. In addition, Seward testified that on either December 29 or 30, Downie called him and said that

> he wasn't kidding around, that he was definitely going to have all the handbillers or leaflets arrested if they didn't leave the property, whether it was up at Great American, or down at the entrance at the mall, or the public right of way.

He further testified that he told Downie that he had instructed his men to stay on the public right-of-way. He had checked with the New York State Highway Department and determined where the leafleters could stand without being on Respondent's property and they had a right to be there.

Respondents have procedures wherein organizations (principally nonprofit or charitable) are permitted to use their facilities for fundraising or public awareness programs. Reynolds testified that when he receives requests to use some portion of the Cooperstown store or adjacent areas, he tells the applicant to contact Respondent Victory's main office in Utica, New York, where it maintains application forms and release forms for organizations wishing to conduct activity at its stores, with a specific license agreement for applicants to complete. Organizations that have requested, and received such permission, to solicit at Respondent Victory's stores are Veterans of Foreign Wars, the American Cancer Society, the

Salvation Army, the League of Women Voters, and other similar organizations. The Union never applied for permission to solicit on its premises. Local 1, United Food and Commercial Workers, which represents Respondent Victory's market employees, has run a blood drive and raised money for the American Cancer Society through this procedure. Toomey testified that political parties would not be given permission to solicit in this manner, although the League of Women Voters has done so. He testified that the Union would not have been denied permission to solicit simply because they were a union, but they would have been denied permission because the information that they were disseminating was not truthful or accurate.

Respondent Concord also allows such solicitation at its premises. Examples are the Salvation Army and musical societies. There have also been sales events by automobile and motorcycle dealerships at the mall. In addition, the General Counsel introduced a newspaper article and a newspaper advertisement about a Students Against Drunk Driving promotion booth and "Slot Car Races" to benefit the American Heart Association that were conducted at the mall.

Southside Mall is one of four major business centers in the area; the others are two similar shopping centers and the downtown Oneonta shopping area. Respondent Victory advertises in the local newspapers of Oneonta and Cooperstown as well as the local radio stations in the area.

Reynolds testified that there are no signs posted at the Cooperstown store restricting access to the premises. Seward, Sullivan, Zukaitis, Erikson, Strothers, and Toomey testified that they did not see any no solicitation or limited access signs at the Southside Mall; Schel testified that he remembers seeing a sign saying no solicitation without certain approvals. It was posted near the movie theater in the mall, not in Respondent Victory's store at the mall.

Finally, the General Counsel alleges that Respondent Victory's actions at the Oneonta store violated the Act for an additional reason; pursuant to its lease agreement, it had no authority over the physical areas involved. Toomey testified that Respondent Victory has control over the sidewalk in front of its store at the Southside Mall. The lease agreement between Respondents during the period in question provides that Respondent Concord shall be responsible for the maintenance and repair of the "common area," that it will keep this area clean, safe, and orderly and that there shall be no advertisements at, or merchandise sold in, the common area, although Respondent Victory, its customers and employees may use this common area, and Respondent Victory may use this area for the storage of its shopping carts. Section 11.6 of the lease agreement provides:

> All common areas shall be subject to the exclusive control and management of Landlord [Respondent Concord] and Landlord shall have the right, at any time and from time to time, to establish, modify, amend and enforce uniform rules and regulations with respect to the Common Areas and the use thereof. Tenant agrees to abide by and conform with such rules and regulations upon notice thereof, and to cause its Concessionaires, invitees and licensees and its and their employees and agents, so to abide and conform. Landlord reserves the right, from time to time, to utilize portions of the Common Areas for carnival type shows, rides and entertainment, outdoor shows, displays, product shows, advertising purposes, and other uses which, in Landlord's judgment, tend to attract the public, provided that the portion of the Common Areas front of Tenant's [Respondent Victory] building . . . shall not be used for such purposes.

Section 11.6 also provides that the landlord has the right "to close temporarily all or any portion of the Common Areas to discourage non-customer use."

IV. ANALYSIS

The instant matter involves Respondent Victory's store in Cooperstown, a freestanding store and Respondent Victory's store at the Southside Mall, a shopping center in Oneonta operated by Respondent Concord and containing numerous other stores. Both are located in small cities adjacent to rural areas and have large parking areas with access to main roadways. The General Counsel alleges that Respondent Victory violated Section 8(a)(1) of the Act by its actions toward the leafleters at the Cooperstown store on December 23, 29, and 30, and at the Oneonta store on December 23. It is similarly alleged that Respondent Concord's actions that were intended to limit the leafleters actions at the Oneonta store on December 23, 30, and 31 violated Section 8(a)(1) of the Act. Clearly this case is decided under the dictates of *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), and cases cited there. In *NLRB v. Babcock & Wilcox*, 351 U.S. 105 at 112 (1956), the Court stated:

> Organizational rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. . . . An employer may validly post his property against non employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employers notice or order does not discriminate against the union by allowing other distribution. [Citations omitted.]

It should be noted that the employees' and union's rights discussed in *Babcock*, organizational rights established by the Act, are stronger and distinguishable from the Union's rights here, to protest the choice by Respondent Victory (whose employees are represented by unions) of contractors for the renovation of its Cooperstown store. In other words, a union's right to be on private property to organize an employer's employees are not to be lightly dismissed. If a union seeks the same privilege, when its purpose is to protest an employer's actions that will have no direct effect on its employees, this purpose does not deserve the same protection.

This is especially true here where Union's allegations were based principally on hearsay, surmise, and assumptions.

The Court in *Lechmere* expanded on what it said in *Babcock:*

> the exception to *Babcock*'s rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable human efforts to communicate with them." Classic examples include mining camps . . . and mountain resort hotels. *Babcock*'s exception was crafted precisely to protect the Section 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one."..and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication. [Citations omitted.]

The Court concluded:

> Although the employees live in a large metropolitan area [Greater Hartford], that fact does not in itself render them inaccessible in the sense contemplated by *Babcock* . . . . Access to employees, not success in winning them over, is the crucial issue—although success, or lack thereof, may be relevant in determining whether reasonable access exists. Because the union in this case failed to establish the existence of any "unique obstacles," that frustrated access to Lechmere's employees, the Board erred in concluding that Lechmere committed an unfair labor practice by barring the non employee organizers from its property. [Citations omitted.]

I find that the General Counsel has not overcome this heavy burden imposed by *Lechmere*. Clearly, they have failed to establish any "unique obstacles" to contacting the audience it wished for its message. Although Cooperstown and Oneonta are substantially smaller than Hartford, they have local newspapers and radio stations that could have been employed to present the Union's message. By no means is this audience inaccessible. Additionally, as stated above, the situation here does not involve employees' organizational rights; Respondent Victory's employees are already represented by a union. What is involved here are the attempts by a number of unions, that do not represent Respondents' employees, to notify the public that work being performed at Respondent Victory's store was being performed (allegedly) for substandard wages by out-of-area employees. This is not as important a right as employees' organizational rights. Finally, I find that the General Counsel has not established that Respondents allowed similar solicitation by others, thereby discriminating against the Union. The record establishes that Respondent Victory has an established procedure for organizations wishing to solicit at its stores and that the Union never availed itself of this procedure. Organizations that have filed the required forms, and have solicited at Respondent Victory's stores are those that one would expect: Veterans of Foreign Wars, American Cancer Society, the Salvation Army, the Girl Scouts, and Boy Scouts. Toomey testified that political parties would not be allowed to solicit because they "can offend others," although the League of Women Voters was permitted to solicit. The Union would not have been denied permission to solicit simply because it was a union; in fact Local 1, which represents its employees, conducted a blood drive and raised money for the American Cancer Society on its premises. Rather, the Union would have been denied permission because the contents of the leaflets were not truthful or accurate. My observation of the leaflets is that they were, at least, somewhat misleading and not thoroughly investigated. For all these reasons, I find that the General Counsel and the Union have failed to established this difficult burden allowing them access to Respondents' premises.

The matter does not end there, however. *Lechmere* decided that an employer (in specified circumstances) can exclude union representatives from its property. Implicit in this is that the property involved is owned, or legally controlled, by the employer involved. *Lechmere* involved not only the employer's attempts to deny the union access to its property, but to public property as well. The court of appeals, at 914 F.2d 313, 325 (1st Cir. 1990), affirmed the Board and found that by attempting to have the police remove the union representatives from *public* property, *Lechmere* violated Section 8(a)(1) of the Act:

> The overarching legal principle is staunch: an employer cannot interfere with protected union activities that occur away from its premises. . . . In general, therefore, an employer violates Section 8(a)(1) by trying to silence non employee union organizers in their efforts to communicate with employees from public property adjacent to the workplace. [Citations omitted.]

As stated by the Board in *Payless Drug Stores*, 311 NLRB 678 fn. 2 (1993), the Supreme Court's grant of certiorari in *Lechmere* did not extend to this holding, and the Board, at 308 NLRB 1074, reaffirmed its prior holding that *Lechmere* violated Section 8(a)(1) of the Act by attempting to remove union representatives from a public area adjacent to its parking lot.

As stated above, the other exception is that an employer cannot exercise rights that it does not possess. The General Counsel alleges that Respondent Victory lacked the authority to attempt to remove the union representatives from the Southside Mall. The lease agreement between Respondents defines common areas as those portions of the shopping center that were designed and improved for the common use and benefit of more than one occupant including, but not limited to, parking lots, open and/or enclosed malls, and exterior walks. The lease also provides that the landlord, Respondent Concord, shall, at its sole cost and expense, keep and maintain the common areas in good condition and repair and in a neat, clean, orderly, and sanitary condition. Section 11.6 provides: "All common areas shall be subject to the exclusive control and management of Landlord," and that Respondent Concord has the right "to close temporarily all or any portion of the Common Areas to discourage non-customer use." Respondent Victory, its employees and customers, are authorized to use these common areas "for their

intended uses and purposes," but no merchandise may be sold or displayed in these areas.

In *Bristol Farms*, 311 NLRB 437 at 438 (1993), the Board stated: "the initial question is whether the Respondent possessed a property right that, without considering any possible Section 7 privilege that the union agents may have had, entitled the Respondent to exclude them from the sidewalk in front of its store." The Board found that it did not possess this right and therefore violated Section 8(a)(1) of the Act. In *Payless Drug Stores*, supra, the Board also found that under state law the employer had no right to exclude the union agents from the entrance to its store and therefore had no property interest defense to the allegation that it interfered with the union representatives' Section 7 rights. In a case analogous to the instant matter, *Polly Drummond Thriftway*, 292 NLRB 331 (1989), the employer operated a store, pursuant to a sublease from A&P, in a shopping center consisting of 17 units. After the union picketed in front of the employer's store protesting Respondent's failure to recognize the union as A&P had, the employer attempted to have them arrested or removed from the property. In finding a violation, the Board stated:

> We agree with the judge that this lease did not convey to A&P the sidewalk in front of the leased store building. Rather, it granted to A&P only the right to use the sidewalk in common with the other occupants of the shopping center. Further, under the lease, "all duties, responsibilities, and liabilities in regard to . . . control of . . . sidewalks" were assumed by the shopping center owner. Under its sublease with the Respondent, A&P conveyed to the Respondent no greater interest than that which A&P itself possessed. Accordingly, we find it clear that the lease and sublease did not grant the Respondent a property interest giving it authority to exclude anyone from the sidewalk in front of its supermarket. The Respondent merely had a nonexclusive right to use the sidewalk, while control of the sidewalk remained with the shopping center owner. Thus, while the sidewalk in front of Respondent's rented supermarket building was private property, it was not the Respondent's property, and the Respondent lacked the right to exclude anyone from it.
>
> The facts in the instant matter are remarkably similar. Respondent Concord had all the rights and obligations (including the expense) of control over the common areas, which include the sidewalk and parking lot at Southside Mall. Respondent Victory's only rights on the common area were to use it in the same manner that its employees and customers could use it, and to store shopping carts in this area. However, it could not conduct sales in the area. Respondent Concord had "exclusive control and management" of these areas and could "close temporarily all or any portion of the Common Areas to discourage non-customer use." Clearly, this situation is analogous to the facts in *Polly Drummond*, supra, as should be the outcome: that Respondent Victory lacked the requisite property right to exclude individuals from the property in question.

With these principles in mind, I turn to the facts here. The Union leafleted at the Cooperstown store on December 23, 29, and 30. No evidence was established that Respondent Victory lacked the requisite property rights to exclude individuals from this location. Erikson and Reynolds were the only witnesses regarding the December 23 leafleting. Erikson testified that they distributed the leaflets at the curb at the entrance to the parking lot to the cars as they entered the lot. He considered this public property. Reynolds testified that they were distributing the leaflets "at the top of the entrance to the store where they were coming in," which he considered "store property," not public property. Even if this was public property, because it would (and apparently did) cause a blockage of traffic into the main road, with a resulting danger to motorists driving by, I find that Respondent was warranted in asking them to leave this location. Marciano and Zukaitis leafleted at Cooperstown on December 29 and 30. Zukaitis testified that they were on the public right-of-way while they were leafleting the cars entering and leaving the parking lot. Marciano's testimony is not so clear as to whether they were on public or private property at this time. However, it is not necessary to make this determination because the sole evidence of their exclusion from the property on those days is Marciano's testimony that the police told him: "we were blocking traffic and . . . if we didn't leave we would be arrested." There is no evidence that Respondent Victory had them removed. I therefore recommend that all the allegations regarding the incidents at the Cooperstown store be dismissed.

Zukaitis and Erikson leafleted at the entrance to the Oneonta store on December 23. Clearly they were on private property and they could legally have been removed by an organization with the authority to do so; as found above, Respondent Victory lacked this authority. On that day, Zukaitis was told by the store manager that unless he left he would be arrested and Erikson was told by Strothers that he would have to leave. Since Respondent Victory lacked the authority to make these demands, it violated Section 8(a)(1) of the Act by doing so.

Sullivan, Zukaitis, and Kellog leafleted at Oneonta on December 30. Sullivan's testimony that union member Andrews told him that the mall manager told him that he was not supposed to be there and that the police would be called to arrest him was hearsay testimony and was not received for the truth of the statement. In addition, Sullivan, Zukaitis, and Kellog each testified that they left after Trooper Brasier told them that she had a statement or deposition from the mall manager and that she could have them arrested if they refused to leave. The mall manager is employed by Respondent Concord, which had the authority to remove individuals from private property. The testimony is that Sullivan, Zukaitis, and Kellog spent most of their time at the entrance and exit lanes from the parking lot, where they met with Trooper Brasier. There is no evidence that they were on public property at the time. I therefore find that Respondent Concord was entitled to demand that they leave at that time.

Finally, Seward testified that on either December 29 or 30, Downie called him and told him that all the handbillers and leafleters would be arrested if they didn't leave the property, "whether it was up at Great American, or down at the entrance at the mall, or the public right of way." Downie, as a representative of the landlord, was legally entitled to remove, or threaten to remove, individuals from Respondent Concord's private property. "Up at Great American" is private property as is "down at the entrance at the mall." "The

public right of way'' clearly is not private property and Respondent Concord could not exclude, or threaten to exclude, the union representatives from this location. Although Seward's testimony was often confused and always rambling, he was not an incredible witness and so I would credit this testimony and find that by threatening to exclude and arrest the Union's leafleters from the public right-of-way, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents have each been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Victory violated Section 8(a)(1) of the Act by unlawfully prohibiting members of the Union and others from distributing leaflets in front of its store at the Southside Mall.

4. Respondent Concord violated Section 8(a)(1) of the Act by unlawfully restricting the Union from distributing leaflets on public property adjacent to the Southside Mall.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, the posting of the attached notices.

[Recommended Order omitted from publication.]